Rights and Duties of the Seller and the Buyer

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Hector MacQueen

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HECTOR MACQUEEN

Professor of Private Law
School of Law
University of Edinburgh

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Abstract: The paper was first given as a lecture at a conference in King Charles University Law School, Prague, assessing the draft Czech Civil Code provisions on sale of goods. This paper considers the provisions on the obligations of seller and buyer under the draft Code, critically analysing them in the light of both the United Kingdom Sale of Goods Act 1979 and the chapter on Sale in the Draft Common Frame of Reference. The paper concludes that the DCFR offers the most attractive way forward for codification in this field.

Keywords: law, codification, comparative law, sale, obligations of seller and buyer, transfer of title, conformity

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Introduction

Let me begin by acknowledging with gratitude the kind invitation to return to the Law School of the King Charles University here in Prague. I greatly enjoyed my first visit almost exactly one year ago, on the occasion of the meeting here of the Study Group on a European Civil Code. The prospect of an early return meant that no second thoughts were necessary before accepting Professor Lubos Tichy's proposal that I come to this meeting on sale in the draft Czech Civil Code. I am delighted and honoured to be with you.

My topic is "Rights and Duties of the Seller and the Buyer". I have read the relevant provisions of the draft Code with interest. The comments I have to offer will be made on the basis of a comparison of the provisions with the United Kingdom Sale of Goods Act (SOGA) and the chapters on Sale in the Draft Common Frame of Reference (DCFR) as first published in February 2008. I will therefore limit myself to issues about the sale of moveables, since the UK Act and the DCFR are not concerned with the sale of immoveables. This means, I think, that I am concerned primarily with Articles 1815-1858 and 1897-1903 of the draft Code.

The structure and language of the draft is not always clear. This may be a problem with the English translation; but even allowing for that difficulty, the order and grouping of the provisions is not always obvious, making it not easy to be sure that one has always understood how they are intended to interact. Sometimes provisions which must be related are far apart from one another;

* This is the revised text of a paper given at a conference on the draft Czech Civil Code chapter on sales, held in the King Charles University of Prague on 5 December 2008.

and as a result it would be easy for the user to miss something relevant and important. I cannot say that the SOGA is a model in this regard either. It too scatters the various rules around the text of the statute following no very obvious order or scheme, and unhelpfully treating some of the basic obligations of seller and buyer as a matter of implied terms in the contract of sale while simply making others, such as the duty to deliver or pay the price, rules of law about the performance of the contract (which are, however, often default rules for when the contract says nothing to the point). Not only does this make for a conceptually incoherent picture, it also means that in order to get the complete picture, one has to jump about the Act a good deal, or get a good textbook[1] which puts the law into some sort of meaningful order and shape.

In contrast, while the DCFR also subjects its rules to the possibility of exclusion by parties' contracts,[2] it does make a serious attempt to provide a structured approach to our subject. In particular it starts its account of the obligations of seller and buyer respectively with an "*overview*" or summary of the obligations: for the seller, to transfer ownership, deliver the goods, transfer any documents representing or relating to the goods as may be required by the contract, and ensure conformity of the goods with the contract;[3] for the buyer, to pay the price, take delivery of the goods, and take over documents representing or relating to the goods as may be required by the contract.[4] The reader can thus see at a glance what the basic obligations are, and then move on to the immediately succeeding Articles to see more detail on each of them.

It should be noted that the DCFR provisions on the seller's obligations are drawn from the Principles of European Law: Sales (PEL S) produced by the Study Group on a European Civil Code

[1] E.g. P S Atiyah, J N Adams and H MacQueen, *The Sale of Goods* (11th edn, 2005).
[2] II.-1:102.
[3] IV.A.-2:301.
[4] IV.A.-3:101.

and published early in 2008.[5] In turn that text draws heavily upon the Convention on the International Sale of Goods (CISG) and the Consumer Sales Directive 1999.[6] Thus the DCFR text on conformity is very similar to that of the proposal for a Directive on consumer rights published by the European Commission in October 2008.[7] Indeed, this is what should be expected if the Commission intends to use the eventual CFR as a 'tool-box' for future European legislation in the fields of obligations and consumer law. The scope of the DCFR is wider than that of the proposed Directive, but it can be taken as an indicator of the likely course of development should the Commission eventually go further in pursuit of a common European law of sales, whether consumer or non-consumer as well. The relationship with PEL S should also be kept in mind in reading the DCFR, as the former provides a detailed commentary and comparative notes on texts that are the basis of the DCFR provisions.

A final introductory comment is that both the DCFR and SOGA embrace within their relevant provisions aspects of consumer protection as well as commercial and other non-consumer transactions. The draft Code deals with consumer issues separately, but not very lucidly in provisions which supplement the general rules in cases where the seller is an entrepreneur but which are not applicable where the purchaser is an entrepreneur and the purchase relates clearly to the purchaser's business activity.[8] The reader may therefore be able to work out eventually that these supplementary rules do not apply to business-to-business (B2B), non-business-to-non-business (NB2NB) or NB2B sales,[9] thus leaving only the business-to-consumer (B2C) transaction. It

[5] E Hondius, V Heutger, C Jeloschek, H Sivesand and A Wiewiorowska, *Principles of European Law Volume 6 Sales* (2008).
[6] 1999/44/EC. The Directive led to amendments of the relevant SOGA provisions.
[7] Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614 final.
[8] Article 1887(1).
[9] Non-business-to-non-business seems preferable to consumer-to-consumer (C2C) as a description of the private non-commercial sale, at least if the word 'consumer' has in law any relation to its ordinary meaning, under which it is

would be preferable, however, if the rules were more direct than this about their intended scope. There seems to be nothing, however, to prevent the application of the general rules to the NB2NB and the NB2B as well as to the B2B relation; this is of some importance in relation to the conformity rules in particular, as we shall see further below.

In what follows, I adopt the structure of the DCFR and show how I think the draft Code provisions may be related to it, as well as comparing the two instruments and SOGA. In the interests of time and simplicity, I will not discuss cases where the sale is by way of transfer of documents representing or relating to the goods, although I note that, like the DCFR and the SOGA, the draft Code does deal with such cases. Nor will I spend much time on the seller's obligation of delivery or any of the buyer's obligations. The DCFR list has its counterparts in both SOGA[10] and the draft Code,[11] and the differences between them do not seem to merit detailed consideration here. Our focus will therefore be on the seller's obligations to transfer ownership and to deliver goods that are conform to the contract of sale.

Seller's obligations: to transfer ownership

The DCFR contains no further explicit provision imposing this obligation.[12] Nor does the UK Sale of Goods Act have anything precisely in parallel to even the very brief text of the DCFR. In essence for both, the obligation is inherent in the very definition of a contract of sale as one in which the seller undertakes to transfer ownership of the goods to the buyer in return for the latter's

clearly not applicable to a seller or supplier of goods or services. An example of an NB2B relation is where a private individual sells her book collection to a book-dealer.

[10] ss. 27, 28.

[11] Articles 1849-1851.

[12] See also PEL S, Article 2:001, Comments and Notes.

undertaking to pay the price.[13] SOGA does however imply terms into the contract of sale under which in effect the seller guarantees that he has a title to transfer and that the buyer will receive free from other claims or entitlements to the goods.[14] These implied terms cannot be excluded by express contract terms.[15] In contrast, while the draft Code has a definition of the sale contract similar in general to those in DCFR and SOGA, it is also made explicitly clear that the seller is bound to deliver ownership of the goods to the buyer.[16]

Where perhaps the obligation to transfer ownership becomes most important is when goods are delivered into the possession of the buyer, but it emerges thereafter that the goods are subject to a third party claim of ownership or something near to it in nature. The SOGA and DCFR deal with this situation, however, as an aspect of conformity rather than as one of the obligation to transfer ownership, holding, in the language of the DCFR, that "the goods must be free from any right or claim of a third party".[17] Likewise under Article 1828 of the draft Code, there is a *legal* defect if the buyer does not acquire ownership of the goods sold, or if the purchaser's right of ownership is restricted by the rights of a third party in the goods. But this provision does not apply if the restriction flows from a third party's industrial or intellectual property right of which the buyer was or should have been aware at the time the contract was concluded.[18] The draft Code thus appears to impose a strict liability on the seller to transfer ownership, qualified only by the buyer's knowledge of any difficulty arising from an intellectual property right.

[13] DCFR IV.A.-1:202; SOGA s.2(1).
[14] s.12.
[15] Unfair Contract Terms Act 1977, ss.6(1) and 20(1).
[16] Articles 1807, 1815.
[17] SOGA s.12; DCFR IV.A.-2:305.
[18] Articles 1828, 1829.

In contrast, the DCFR takes the *seller's* knowledge of the intellectual property right, or knowledge that the seller could reasonably be expected to have, as primarily determinative of its liability under this head. In the absence of such seller knowledge, the buyer has no claim.[19] If however the seller knows, and the buyer *also* knows of the non-conformity at the time of the conclusion of the contract, then the seller is not liable.[20] DCFR also pays attention to the buyer side in the case where that party has supplied technical drawings, designs, formulae or other specifications with which the seller has then complied, and it is these materials which infringe the intellectual property rights; in such a case the buyer has no claim against the seller.[21]

The case of intellectual property rights is not mentioned in section 12 of the Sale of Goods Act, which simply provides that in a contract of sale there are implied terms that the seller has the right to sell the goods or will have such a right at the time ownership is to pass; that the goods are free and will remain free until property passes from any charge or encumbrance not disclosed to or known to the buyer before the contract is made; and that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by the owner or other person entitled to the benefit of any disclosed or known charge or encumbrance.

The situation where the transfer of ownership in the goods is affected by intellectual property rights can however be illustrated in English case law. In *Niblett v Confectioners' Materials Co*,[22] CM, an American company, sold 3,000 tins of preserved milk to N in the UK, but when the goods arrived in England they were detained by the customs authorities because their labels infringed the trade marks of a well-known English company. It was held that since this latter company could

[19] IV.A.-2:306.
[20] IV.A.-2:307.
[21] IV.A.-2:306(2).
[22] [1921] 3 KB 387.

have obtained a court order to prevent the re-sale of the goods by N, the original sellers had had no right to sell them. The reasoning seems suspect: ownership of the tins of milk as such could be transferred by the seller, but the third party trade mark rights meant that the buyer could not enjoy the benefit of the ownership so transferred. Under the DCFR and the draft Code, the right of the third party trade mark owner to prevent the buyer's use of the goods would have been the basis for the claim, which makes better sense of the result. In *Microbeads AG v Vinhurst Road Markings Ltd*[23] the buyer's quiet possession of the goods was disturbed by a patentee, but the latter had only acquired its patent *after* the sale in question, albeit the application process was under way *before*. But there was no way either of the contracting parties could have known about this before the publication of the patent specification. The buyer was nevertheless awarded damages for breach of section 12. Under the DCFR and the draft Code the outcome would have been different, given the lack of knowledge on the part of either seller or buyer.

I notice that the draft Code has in its general property section provisions for the transfer of ownership by non-owners; that is to say, the buyer from a non-owner may nonetheless become owner.[24] The DCFR rules on this topic have not yet been published; but there are of course detailed and much-litigated rules in the UK Sale of Goods Act.[25] It is not necessary to go into these rules in detail. Here I want only to raise the question of whether in such cases the buyer who has become owner has none the less any claim against its non-owning seller, for example, in respect of the expense and inconvenience of defending the claim of ownership against whoever was the owner at the time of the sale. In the *Niblett* case Atkin LJ thought that in such circumstances there

[23] [1975] 1 All ER 529.
[24] Articles 964, 965
[25] ss. 24, 25. See further *Atiyah, Adams & MacQueen*, chapter 21.

was no breach of section 12 of SOGA,[26] and there is an Irish case so holding in 1967.[27] But in the textbook by *Atiyah, Adams & MacQueen* it is suggested that "There is a breach of the condition implied by s. 12(1), but the buyer has in fact suffered no damage from the breach and cannot therefore maintain an action against the seller."[28] The point of this is that, while the buyer may be unable to claim damages in the absence of loss, other remedies may be available if there is a breach and this may be significant in some contexts:

> There may be circumstances in which the buyer may justifiably wish to reject the goods, even though he has acquired a good legal title. For example, it seems that the legal title which is obtained under Part III of the Hire-Purchase Act 1964, where a private purchaser buys a motor vehicle which is the subject of a hire-purchase agreement, is not in practice always a very satisfactory one. The reason for this is that the if the buyer later wishes to sell or trade in the vehicle to a motor dealer, the dealer will in all probability discover the outstanding hire-purchase agreement and may well refuse to buy it. It seems therefore, that the buyer should be entitled to reject the goods in such a case. And such a result would be justifiable because even though in these cases the seller has the *power* to confer a title on the buyer, he does not have what the Act specifically requires him to have, namely a '*right* to sell the goods.[29]

It may however be thought that this approach, working from one of the remedies available for breach of an obligation to determine whether or not the obligation exists in the first place, is characteristically English in its reversal of the proper order of thought about rights and remedies. This Scots lawyer can only say that he will have to go away and think about it some more before the next edition of *Atiyah, Adams & MacQueen*! I do not know whether the context of special

[26] [1921] 3 KB at p 401.
[27] *Anderson v Ryan* [1967] IR 34.
[28] *Sale of Goods*, p 113.
[29] Ibid, pp 113-114, emphases supplied.

rules about the sale of motor vehicles initially supplied under hire purchase agreements has any parallel in the Czech Republic; if not, the comparison is not especially useful.[30] Again, the point about the language of SOGA made in *Atiyah, Adams & MacQueen* is a good but narrow and context-specific one, and certainly not applicable to the DCFR or the Czech draft Code. For the latter the seller can only be liable if the buyer has not acquired ownership, while under the DCFR the seller only guarantees "freedom from any right or claim of a third party". A question may be whether the seller is liable under this if a third party makes an ultimately unsuccessful claim against the buyer for ownership of the goods. The DCFR's definitions annex says that a "claim is a demand for something based on the assertion of a right".[31] That would certainly not cover the case specifically figured in *Atiyah, Adams & MacQueen*, where the problem is a third party's non-acceptance of the buyer's ownership rather than the assertion of a right; and it is suggested that it also does not cover the ultimately unsuccessful assertion of a right of ownership against that of the buyer.

Seller's obligations: to ensure conformity of the goods with the contract

Conformity with the contract is where the DCFR has its most elaborate provisions.[32] The subject is given four heads –

- Quantity, quality and description
- Containers and packaging
- Accessories and installation instructions

[30] On Part III of the Hire Purchase Act 1964 see *Atiyah, Adams & MacQueen*, pp. 410-413.
[31] p 328.
[32] See also PEL S, Chapter 2, Section 2.

- Compliance with other Articles in the section dealing with the subject (this for the most part we have already dealt with above in the discussion of the obligation to transfer ownership, and it will not be discussed further here).

The DCFR has no specific provisions on quantity or description beyond the initial statement that goods must meet the requirements of the contract in these regards.[33] But there is a considerable amount of text on quality. The relevant Article, which is based upon Article 2(2) of the CSD,[34] reads as follows:

> The goods must:
>
> (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;
>
> (b) be fit for the purposes for which goods of the same description would ordinarily be used;
>
> (c) possess the qualities of goods which the seller held out to the buyer as a sample or model;
>
> (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;
>
> (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may reasonably expect to receive; and
>
> (f) possess such qualities and performance capabilities as the buyer may reasonably expect.[35]

The relevant time for determining conformity under these DCFR provisions is when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time.[36] Risk passes

[33] IV.A.-2:301.
[34] See also Proposal for a Directive on Consumer Rights, Article 24(2).
[35] IV.A.-2:302.

when the buyer takes over the goods;[37] this means that the buyer must pay for the goods, unless the loss or damage resulting from the materialisation of the risk is due to an act or omission of the seller.[38] Further light is cast on when non-conformity is judged by the requirement imposed on the buyer to give notice of the non-conformity to the seller within a reasonable time if it wishes to take action upon the defect.[39] The buyer is thus bound to examine the goods "within as short a period as is reasonable in the circumstances", otherwise the right to rely on the lack of conformity may be lost.[40] The reasonable time runs from when the goods are supplied, or, if it is later from the time when the buyer discovered, or could reasonably be expected to have discovered the non-conformity.[41] Thus it is clear that a latent defect not detected on or shortly after the buyer takes over the goods may still give rise to non-conformity and a claim thereon once it emerges or is found by the buyer.

SOGA's approach is coloured by the Act's origins as a codification of commercial custom in nineteenth-century England, although it has been heavily modified over the last 35 years in order the better to protect consumers, not least as a result of the UK implementation of the CSD in 2002.[42] The rules are still expressed, however, as a series of implied terms – that is, as rules which can be set aside by parties who agree different express terms,[43] or where there is an express term inconsistent with the implied terms.[44] One has to look outside SOGA altogether – to sections 6 and 20 of the Unfair Contract Terms Act 1977 – to find rules saying that even in commercial

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[36] IV.A.-2:308(1).
[37] IV.A.-5:102, 5:103.
[38] IV.A.-5:101.
[39] III.-3:107.
[40] IV.A.-4:301.
[41] III.-3:107(2).
[42] Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045. The preceding history is briefly outlined in *Atiyah, Adams & MacQueen*, pp. 145-147.
[43] s.55(1).
[44] s.55(2).

contracts such exclusions may be regulated by the courts on grounds of fairness and reasonableness (although in practice there have not been many cases to illustrate that possibility).

There are still traces of the *caveat emptor* approach which was characteristic of the mercantile world from which SOGA originally came. So there is no implied term about the quality of the goods in relation to either matter specifically drawn to the buyer's attention before the contract is made or which examination of the goods *before the contract is made* ought to reveal if the buyer examines the goods.[45] But the original SOGA concept of "merchantable quality", another reflection of the nineteenth century which sat uneasily with consumer protection ideas, has now been replaced by the more anodyne "satisfactory quality", which is the implied condition in every sale where the seller is acting in the course of a business.[46] Satisfactoriness is defined in terms of what a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all other relevant circumstances.[47] The quality of goods includes their state and condition, and there is a non-exclusive list of "aspects of the quality of goods", most of which are responsive to issues that had come up under the earlier law, especially in relation to consumers.[48] The list goes as follows:

- Fitness for all the purposes for which goods of the kind in question are commonly supplied;
- Appearance and finish;
- Freedom from minor defects;
- Safety;

[45] s.14(2C).
[46] See further *Atiyah, Adams & MacQueen*, pp. 162-199.
[47] s.14(2A). Implementing the CSD, the relevant circumstances in consumer sales include any public statements on the specific characteristics of the goods made about them by the seller, producer or his representative, particularly in advertising and labelling (s.14(2D)).
[48] s.14(2B). See further *Atiyah, Adams & MacQueen*, pp. 175-190.

- Durability.

Perhaps the key idea to note here is "fitness for purpose", which as we have seen is also the pre-eminent feature of the DCFR concept of quality. But it is clear from the subsequent items on the SOGA list that this "fitness for purpose" is not a purely functional requirement; non-functional aspects of the goods, such as "appearance and finish", are included.[49] This is important in consumer cases in particular. So for example in the leading case of *Rogers v Parish (Scarborough) Ltd*,[50] which arose from the sale of a new motor vehicle, it was held that in assessing the buyer's reasonable expectations, -

> … one would include … not merely the buyer's purpose of driving the car from one place to another but of doing so with the appropriate degree of comfort, ease of handling and reliability and, one may add, of pride in the vehicle's outward and interior appearance.[51]

But it is quite possible for non-functional aspects to be relevant in commercial sales as well. The typical situation would be where the purchaser is an end-user of the goods supplied rather than one who uses them to manufacture or process further goods for re-sale. For example, when a restaurant business orders new furnishings for its premises, it is not enough that the tables and chairs serve their functions of carrying objects and people; they must also have the quality of finish that is consistent with the ambience the business wishes to create for its customers in the restaurant.

[49] See further *Atiyah, Adams & MacQueen*, pp. 185-188.
[50] [1987] QB 933.
[51] Per Mustill LJ at 944.

There are three other implied terms under SOGA:

- a requirement that goods must correspond with any description applied to them, in the contract or otherwise;[52]
- another that where the buyer makes a particular purpose known to a seller in the course of a business, the goods must be reasonably fit for that purpose, whether or not it is a purpose for which such goods are commonly supplied, unless the circumstances show that the buyer does not rely, or that it would be unreasonable for him to rely, on the seller's skill or judgment;[53]
- and finally one in contracts for sale by sample, that the bulk will correspond with the sample and the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.[54]

The second of these corresponds to the provision already quoted in DCFR IV.A.-2:302(a), except that the latter does not require the seller to be acting in the course of a business. This requirement of SOGA in, not only the fitness-for-particular-purpose obligation, but also in the satisfactory quality one, means that the quality rules apply in B2B and B2C cases, but not to NB2NB or NB2B ones. Thus in cases where the seller is not acting in the course of a business, the dis-satisfied buyer is forced into bringing any complaint about the conformity of the goods under the implied term about correspondence with description, leading to unsatisfactory debates about the difference between description and quality.[55] The more general approach of DCFR avoids not

[52] s.13. See further *Atiyah, Adams & MacQueen*, pp. 149-162.
[53] s.14(3). See further *Atiyah, Adams & MacQueen*, pp. 199-212.
[54] s.15. See further *Atiyah, Adams & MacQueen*, pp. 212-215.
[55] See further *Atiyah, Adams & MacQueen*, pp. 158-160.

only such debates but also questions about when a seller may be acting in the course of a business, which have also bedevilled the courts in the United Kingdom over the years.[56]

The time of conformity under SOGA is normally taken to be at the time of delivery. This has to be inferred, however, from section 34 of the Act, under which the seller must on delivery afford the buyer a reasonable opportunity to examine the goods for the purpose of ascertaining whether they are in conformity with the contract. A problem can arise in connection with the transfer of risk, however, since under the relevant SOGA provisions that may in some cases occur *before* delivery.[57] Thus where goods deteriorate between the passage of risk and delivery there may be an issue as to whether a defect of quality is a breach of obligation for which the seller is liable or simply the materialisation of a risk which is therefore the buyer's loss. It has been suggested that a solution to this problem is provided by a notion that 'constructive delivery' occurs at the time risk passes;[58] but this fictional approach is not especially attractive by comparison with the DCFR approach under which risk only passes when the buyer takes over the goods.

A different problem was presented by the case of *Mash and Murrell v Joseph I Emmanuel*,[59] where sellers in Cyprus sold potatoes to be shipped to the buyers in Liverpool. Risk passed to the buyers on shipment. The potatoes were sound when loaded into the ship but had rotted by the time of its arrival in Liverpool. It was held at first instance that the sellers were liable for the defect on the basis that the goods must be loaded in "such a state that they could endure the normal journey

[56] See further *Atiyah, Adams & MacQueen*, pp. 167-168, 204-205.
[57] On transfer of risk under SOGA generally, see *Atiyah, Adams & MacQueen*, pp. 353-360, especially at pp. 354-356.
[58] *Atiyah Adams & MacQueen,* pp. 147-148. The suggestion is that of Professor Atiyah, and is not necessarily supported by the current editors.
[59] [1961] 1 All ER 485.

and be in a merchantable condition on arrival".[60] Risk of deterioration in the course of transit which arises as a result of the defective condition of the goods at the commencement of the transit is not the buyer's responsibility.[61] This approach is now reinforced by the statutory reference to durability as an aspect of quality mentioned above.

SOGA also has a number of rules on quantity obligations, although these rules do not take the form of implied terms. The substance of these rules belongs to the law of remedies, in particular the buyer's right to reject in cases where wrong quantities are supplied. So, acting strictly within my remit, I will simply leave their content to the footnote below.[62]

If we turn now to the draft Code in the light of the foregoing accounts of the DCFR and SOGA, we find first a general provision like that in the DCFR that the seller must deliver goods of the specified amount, quality and kind.[63] The Article does not say where the specification of these matters is made, but states that if the quality or kind is not agreed, that is, not expressly stated in the contract, then the quality or kind required is that "*suitable for the purpose specified in the agreement, otherwise for the usual purpose*". So, as in the DCFR and SOGA, "fitness for purpose"

[60] per Devlin J at 485.

[61] The decision was reversed on its facts in the Court of Appeal, but not on the law: [1962] 1 All ER 77. See also *Lambert v Lewis* [1982] AC 225 and *Atiyah, Adams & MacQueen*, pp. 189, 357.

[62] Subject to usages of trade, special agreement, or course of dealing between the parties (s.30(5)), the following rules apply:

Seller delivers less than contractual amount	Buyer may reject or accept whole; if accepting, must pay contract rate
Seller delivers more than contractual amount	Buyer may reject the excess and accept the rest; OR reject the whole; OR accept the whole, paying contract rate for all

In Scotland, the right to reject in either of these cases is dependent upon the materiality of the excess or shortfall, save that the buyer is always entitled to reject the extra part of an excess delivery (s.30(2D)); in England and Wales, the test is likewise a limitation on the right to reject the whole for a shortfall or an excess "so slight that it would be unreasonable for [the buyer] to do so" (s.30(2A)). See further *Atiyah, Adams & MacQueen*, pp.139-144, 499-500.

[63] Article 1823.

is the dominant notion in the draft's conceptualisation of quality unless there is some alternative to be found in the wording of the contract.

According to Article 1827, an item is defective if it does not have the "*properties*" stated in Article 1823. There is however not much elaboration of this elsewhere in the draft Code to compare with DCFR or the list of aspects of quality found in SOGA. This is even more surprising in the light of the existence of such a list in the CSD, which presumably should be implemented already in the Czech Republic and certainly should be included in the present draft. Article 1890(2), in favour of consumers, states that the goods must have "*the properties that the purchaser or the producer has described or that the purchaser has expected based on the advertising of the seller or producer*", and must correspond "*to the purpose stated by the seller for the use of the item or for which the item is usually used*"; but this, although seemingly picking up the CSD, seems to give no room to any idea that the *consumer's* purpose or reasonable expectations might be based on anything other than the way in which the seller or producer choose to market the goods.

There seems accordingly to be some danger that "fitness for purpose" will be understood, as it was in the United Kingdom before 1980,[64] mainly in relation to the functional fitness of goods and not necessarily bring in to play such matters as appearance and finish, or freedom from minor defects which do not affect the general functionality of the goods. This, it is suggested, could leave the Czech law open to challenge as inconsistent with the CSD.

The draft Code does provide, however, as in DCFR IV.A.-2:302(c) and SOGA section 15, that if a sample or model was used in the negotiation of the sale, the goods delivered must conform to

[64] See e.g. *Millers of Falkirk v Turpie* 1976 SLT (Notes) 66.

that sample or model unless the contract otherwise provides; there must be conformity with *both* sample/model and contract if they are different but not discrepant.[65] There are also rules that the seller must pack the goods and prepare them for transport,[66] following the customary ways of doing this or that which is necessary to preserve and protect the item;[67] there are roughly corresponding provisions in the DCFR.[68]

There are provisions in Articles 1844-1848 of the draft Code for *express* warranties of quality in terms of the length of time for which the goods must remain capable of being used – durability. In general the guarantee must be such that, unless otherwise provided in the contract, the goods will remain capable of being used for their usual purpose for a period of time starting from the date of delivery.[69] The length of this period of time is however not specified. But Article 1844 appears to recognise that warranty periods may be found in the contract or on the packaging of the goods, while Article 1845 says that if different warranty periods are specified in the contract or "*the warranty representation*", then whichever is longer applies. It is left unclear what the position is where there is no express warranty of quality.

Article 1832 provides for the situation where the buyer has supplied items to the seller, or proposals, samples or materials, for the seller to use in the production of the goods to be supplied under the contract. In the first case, the seller's use of an item supplied by the buyer does not prevent the buyer from complaining of a defect caused by use of the item in the production, unless the buyer insisted on its use against the seller's notification of unsuitability or of inability to

[65] Article 1824.
[66] Article 1823.
[67] Article 1825.
[68] DCFR IV.A.-2: 302(d).
[69] Article 1844, 1846.

determine suitability.[70] The buyer has no rights in respect of defects where the seller proceeded in accordance with the buyer's proposals. These rules have some correspondence with the idea of fitness of the goods for the buyer's particular purpose for which reliance is placed upon the seller's skill and judgement; but it is provision for only a couple of specific instances of the much more general idea found in the DCFR and SOGA.

SOGA's limitation upon quality requirements and ideas of *caveat emptor* is echoed in Article 1833 when it states that the seller is not liable for defects of which the buyer ought to be aware if paying the "*usual attention*" at the conclusion of the agreement.[71] Article 1834 goes on to provide that the buyer must examine the goods as soon as possible after risk passes, in order to verify the properties and quantity of the goods. The close conjunction of these provisions makes it less clear than it is in SOGA, however, that there are two different examinations here, one before the conclusion of the contract which may mean that there is no defect at all, and the other occurring after delivery to enable the buyer to take action in respect of defects thereby revealed. Where the goods are to be carried from seller to buyer this latter examination may await the arrival of the goods at their destination;[72] there is a similar provision in the DCFR.[73]

Further, under the draft Code as under the DCFR, the goods must meet the quality requirement at the moment the risk of damage to the goods passes to the buyer.[74] Risk generally passes upon

[70] Article 1832.
[71] But if the seller either represents to the buyer that the item is without defects or fraudulently conceals defects, then he or she continues to be liable for the defects even if they are ones the buyer should have noticed anyway (Article 1833).
[72] Article 1835(1).
[73] IV.A.-4:301(2).
[74] Article 1830.

acceptance of the item by the buyer or when the seller enabled the buyer to dispose of it.[75] There are other provisions on the passage of risk, but since this is the subject of another paper at this conference, I will say no more about them. The point I wish to make is that Article 1830 recognises the possibility of latent or hidden defects in the goods as accepted by the buyer that may not be apparent until some time after the transfer of risk; but such defects remain covered by the quality obligation of the contract rather than the risk rules. In other words it deals with the situation in the English case of *Mash and Murrell*. The risk rules apply only to defects newly arising after the transfer of risk to the buyer, and normally these will come about as a result of external factors, whether natural forces or third party actions, rather than through simple deterioration of the goods.[76] This differentiation of quality defect and risk should also reinforce any requirement that goods be of appropriate durability.

Unlike the DCFR the draft Code contains some rules about the obligations flowing from the specification of quantities in the contract. As with SOGA, some of these are remedial in content and I pass over them without comment; but worthy of note is a rule that if the contract specifies a quantity only approximately, the exact quantity is specified by the seller, but the deviation from the contract quantity is not to exceed 5%.[77] Finally, Article 1827(1) lays down that the supply of "*another item*" – presumably goods of a kind other than those described in the contract – is also a defect. This appears to be a way of avoiding the concept of the *aliud*, that is, the delivery of goods different from what was agreed upon, being treated as a separate and distinct ground for liability in sales. As already noted, this situation is caught by the DCFR and SOGA under a concept of non-

[75] Article 1852. The general provision in Article 1810(1) that risk passes with ownership is presumably derogated from by the more specific provision relating to moveables in Article 1852.
[76] See also Article 1847.
[77] Article 1826.

correspondence with description, so the three approaches are broadly in line. For this reader, at least, the DCFR and SOGA approach is more easily understood upon a first encounter.

Conclusion

Only a very few concluding remarks need be made. It is clear that the draft Code provisions on the rights and duties of sellers and buyers are broadly in line with the DCFR and SOGA so far as concerns non-consumer sales. Indeed in certain respects I believe the draft Code to be significantly in advance of SOGA, which still carries too much nineteenth-century baggage as well as overly specific rules (for example, the limitation of its quality requirements to sales made in the course of a business). I think my most significant questions would be the following. First would be the suggestion that (like the SOGA) the draft Code would benefit from further consideration of its presentation and structure. In particular the adoption of the DCFR technique of an overview or summary of the parties' obligations would be useful both for the sake of clarity and for the grouping of related provisions. Second, with the seller's obligation to transfer ownership, I am unclear why the seller's knowledge of intellectual property rights affecting the freedom to use the goods is regarded as irrelevant to its liability in such cases. Finally, on conformity, it would be sensible to consider whether the idea of fitness for purpose needs clarification on whether or not non-functional aspects of the performance of goods are covered. At the very least, the adoption of the language of the CSD on this matter would demonstrate that that Directive is implemented in the Czech Republic; while the experience of SOGA and, more significantly, the DCFR (along with the underlying PEL S) suggests that the concepts may be safely and usefully extended to commercial and other non-consumer transactions as well.